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Cases

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1136

MURRAY TILLMAN, ET AL.,

Petitioners,

v.

WHEATON HAVEN RECREATION ASSOCIATION, INC., ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF ON THE MERITS FOR E. RICHARD McINTYRE, RESPONDENT

QUESTIONS PRESENTED

The following question is raised by petitioners:

Whether the court of appeals erred in holding a community recreation association to be a private club and hence exempt from civil rights statutes which prohibit racial discrimination (42 U.S.C. §§1981, 1982 and 42 U.S.C. §2000a), despite the fact that this Court in a previous case (*Sullivan v. Little Hunting Park*, 396 U.S. 229 (1969)) held that an association with vir-

tually identical characteristics could not lawfully discriminate on the basis of race with respect to persons seeking to use its facilities.

In a brief filed prior to the grant of certiorari, this respondent, E. Richard McIntyre, presented the following questions:

> Whether judgment was properly entered in favor of a director of the Wheaton-Haven Recreation Association, Inc., who was opposed to the policy of racial discrimination attributed to the corporation.
>
> Whether an action against a corporation and its directors abates or is rendered moot as to a director removed from office for opposition to the policy of racial discrimination attributed to the corporation.

This Court's grant of certiorari on May 15, 1972, is unrestricted. Accordingly, if the first question is decided in favor of petitioners, this Court should consider and decide the two remaining questions posed by this respondent.

STATUTES INVOLVED

The pertinent civil rights statutes are set out in the Brief for the Petitioners (2-4). In addition, relevant paragraphs contained in the CODE OF MONTGOMERY COUNTY, MARYLAND §111-2, *as amended* (1965), are contained in the Brief of Respondents at 15-16.

STATEMENT

Petitioners brought this action in the United States District Court for the District of Maryland under the 1866 Civil Rights Act and the 1964 Civil Rights Act to compel Wheaton-Haven, a non-profit corporation which operates a member-owned community swimming pool, to extend membership and guest privileges without racial discrimination. Petitioners sought declaratory and injunctive re-

lief, as well as damages, against Wheaton-Haven and 13 of its officers and directors.

This respondent, E. Richard McIntyre, was joined to this action solely because he served on the board of directors when Wheaton-Haven adopted the discriminatory policy complained of. No individual act of discrimination was attributed to him personally. The complaint, as twice amended (A. 4-21), sought to visit collective liability upon the officers and/or directors, based upon the alleged decision of the board of directors to withhold membership and guest privileges from Negro applicants.

In the district court, McIntyre filed a timely motion to dismiss the action as to him or, in the alternative, for summary judgment (A. 34-36), urging *inter alia* the failure of the complaint to state a claim against him individually. In support of summary judgment McIntyre relied upon his deposition, on file in these proceedings (A. 100-129), wherein he denied under oath having supported any racially-motivated policy of exclusion and testified that he favored the admission of petitioners on a non-discriminatory basis (A. 111, 124, 125, 126).

Without passing upon this motion, however, the district court proceeded instead to hold that Wheaton-Haven was "a private club or other establishment not in fact open to the public" under 42 U.S.C. §2000a(e) and thereby exempt from civil rights coverage. No other question was considered or decided as the district court, in acting upon Wheaton-Haven's motion for summary judgment, granted judgment for all respondents (Pet. App. C). The Fourth Circuit affirmed that judgment on October 27, 1971, and denied rehearing *en banc* on December 16, 1971 (Pet. App. B), but did not pass upon the points briefed and argued

by McIntyre except to note that he "championed the cause of the admission of Dr. Press", one of the petitioners (Pet. App. B-30).[1]

The pivotal issue involved in this controversy, here and in the courts below, is whether Wheaton-Haven is a private club or establishment not in fact open to the public. Although petitioners outline many of the facts bearing on this issue, we are obliged to correct several inaccuracies which appear therein.

Contrary to petitioners' statement (Pet. Br. 22), it is not true that the record fails to disclose the race of the one applicant formally rejected in the past by Wheaton-Haven. The district court found the rejected applicant was white (Pet. App. C-2). Second, while petitioners assert unequivocally that Wheaton-Haven's new guest policy of limiting guests to relatives of members "was adopted in response to the Tillman's bringing a Negro guest to the pool . . ." (Pet. Br. 5), the district court found that the guest limitation "was intended to keep down the burgeoning number of guests" and merely ventured that petitioner Rosner, the Tillman's guest, "perhaps precipitated" the policy (Pet. App. C-3). This new policy was a further limitation on the existing guest policy which excluded guests residing within a three-quarter mile radius of the pool (A. 115). Third, Wheaton-Haven does not hold itself out to the public, admit the public or advertise to the public, and has not done so since it was organized in 1958 (Pet. App. B-18; C-2, C-3).

Finally, Wheaton-Haven's board of directors is popularly elected by the membership at regular meetings, and

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[1] "Pet. App." refers to the appendix to the petition for writ of certiorari. "A." refers to the appendix submitted with Petitioners' Brief on the Merits.

Wheaton-Haven is member-controlled, member-financed, and member-governed in every respect (A. 42-61; Pet. App. C-2). This is amply demonstrated by the fact that the entire membership voted decisively at the November 1968 meeting to affirm the policy of excluding Negroes as members and to continue the relatives-only guest limitation (A. 109, 117). Moreover, the same membership, at a meeting late in 1970, defeated McIntyre in his bid for reelection to the board of directors.

The case is here on writ of certiorari, granted on May 15, 1972. 92 S. Ct. 1770 (1972).

SUMMARY OF ARGUMENT

1. While respondent McIntyre has consistently opposed Wheaton-Haven's exclusionary policies, he agrees with the courts below that Wheaton-Haven is a private club or establishment not in fact open to the public. Its non-public character takes it outside the ambit of the Civil Rights Act of 1964 (42 U.S.C. §2000a) by reason of the affirmative exclusion set forth in the statute (42 U.S.C. §2000a(e)). Unlike the host of "private" clubs created to evade the 1964 Act, Wheaton-Haven has always been closed to the public. The indicia of Wheaton-Haven's non-public character, a character that has remained unchanged since 1958, are several: the fact that it is member-controlled, member-financed and member-governed in every respect; that its membership and guest policies are determined by vote of the members; that it does not advertise its facilities, solicit membership, or open its facilities to the public under any circumstances; that it screens and interviews prospective members; that its initiation fees and dues are relatively expensive; and that not all persons desiring membership have been accepted in the past. Given these factors, Wheaton-Haven cannot be considered a public accommodation. "[I]ts

form of organization, its manner of operation, and its member activities are all characteristic of a bona fide private club rather than a place of public accommodation. . . ." (Pet. App. B-22).

As a private club or establishment not in fact open to the public, Wheaton-Haven's prerogatives are preserved by the express exception (42 U.S.C. §2000a(e)) in the 1964 Civil Rights Act, an exception which constitutes a statutory recognition of associational rights grounded in the Constitution. By reason of its status as a self-governing organization, Wheaton-Haven also falls outside the ambit of 42 U.S.C. §§1981 and 1982. The 1964 statute codifies the area of associational privacy that has been consistently recognized by this Court as subject to constitutional protection. The legislative history of the 1964 Act affirms the proposition that Wheaton-Haven, excepted expressly under the 1964 statute, is excepted by implication also from the earlier statutes enacted in 1866.

Moreover, petitioners have not shown how any of their rights under the 1866 Act have been infringed. Surely §1981 was not written to insure contract on demand, provided that the demand was made by a black citizen. Nor can a §1982 claim lie. Unlike the situation in *Sullivan v. Little Hunting Park*, 396 U.S. 229 (1969), Wheaton-Haven has not interfered with a real property transaction. Petitioner Press bought his residence from a vendor who had no membership in Wheaton-Haven and no property interest to convey. Petitioner Tillman, unlike the petitioner in *Sullivan*, can claim no interference either since the guest rules apply to him no differently than any other member of Wheaton-Haven. Since his claim must fall, so does that of his guest, petitioner Rosner.

An extension of the Civil Rights Acts of 1866 or 1964 to embrace a member-controlled association such as Wheaton-

Haven would raise serious constitutional issues. To compel it and its members to receive persons of all races or else disband would impair the traditional rights of free association.

2. Assuming *arguendo* that Wheaton-Haven falls within coverage of civil rights legislation, the judgment should be affirmed as to McIntyre. As the record indicates, he has disapproved the alleged exclusionary policies in his role as a director and then sought to enlist membership support for his position. Indeed, the complaint makes no specific claim against McIntyre. The authorities uniformly hold that a director need not answer personally for corporate acts, absent specific involvement not here shown. This rule has particular application to McIntyre who opposed the acts complained of and who was later defeated by vote of the membership in his bid for reelection to the Wheaton-Haven board.

ARGUMENT

I.

AS A PRIVATE CLUB OR ESTABLISHMENT NOT IN FACT OPEN TO THE PUBLIC, WHEATON-HAVEN IS NOT WITHIN THE COVERAGE OF THE 1964 CIVIL RIGHTS ACT (42 U.S.C. §2000a) OR THE 1866 CIVIL RIGHTS ACT (42 U.S.C. §§1981, 1982).

A. Wheaton-Haven Is A Private Club Or Establishment Not In Fact Open To The Public.

As a matter of club policy, it is McIntyre's position that Wheaton-Haven should not exclude anyone, member or guest, solely on the basis of race. Such exclusions are parochial, ill-advised and inimical to Wheaton-Haven's best interests. However, petitioners are plainly incorrect when they claim that Wheaton-Haven is a public accommodation obliged by Congress to open its doors to all who desire admission (Pet. Br. 28). Rather, we submit, the record sustains the holdings of the two courts below that

Wheaton-Haven, in legal parlance, is a "private club or establishment not in fact open to the public" (42 U.S.C. §2000a(e)) and is entitled to maintain its associational privacy against unwelcome claims to admission.[2]

Petitioners employ varied techniques in their attempt to depict Wheaton-Haven as a public facility. They assert:

(1) Wheaton-Haven has "no plan or purpose of exclusiveness" (Pet. Br. 21),

(2) "personal compatibility with other members is not a qualification for membership" (Pet. Br. 21),

(3) "the sole determinant for membership is residence within the prescribed area" (Pet. Br. 21),

(4) Wheaton-Haven's $375 membership initiation fee and $50-60 annual dues are not "significant" (Pet. Br. 29),

(5) the numerical limitation on membership is not dispositive of its non-public status but merely "a limitation in the interest of health and safety" (Pet. Br. 29).

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[2] The "private club or establishment not in fact open to the public" exception (42 U.S.C. §2000a(e)) in the 1964 Civil Rights Act exempted such establishments from the coverage of the statute. The court of appeals held that this positive exception in the 1964 Act operated by necessity to insulate such exempt establishments from liability under the 1866 Civil Rights Act (42 U.S.C. §§1981, 1982) (Pet. App. B-6). Chief Judge Haynsworth, writing for the court, recognized that the exception was an explicit statutory recognition of rights grounded in the Constitution. "The majority [of Congress], however, justified the exemption for private clubs as an appropriate recognition of rights of privacy and associational preferences in cases 'where freedom of association might logically come into play * * *.'" *See* Additional [majority] Views on H.R. 7152 of Reps. McCulloch, Lindsay, Cahill, Shriver, MacGregor, Mathias and Bromwell, 1964 *U. S. Code Cong. & Ad. News* 2487, 2495. The decision below is harmonious with prior holdings of this Court recognizing the right of persons to associate voluntarily. *See* discussion *infra*, at 21, 24-25. While the 1866 Act contains no express exemption for private clubs, it cannot be applied in a manner which infringes constitutionally protected rights.

Thus, petitioners conclude that "Wheaton-Haven is functionally similar to the recreational facility in *Daniel v. Paul*, 395 U.S. 298 (1969)" and "masquerade[s] as a private club merely in order to exclude Negroes from its facilities" (Pet. Br. 21).

Petitioners' argument is rooted in factual inaccuracies and omissions. Initially, it seems obvious that an organization with detailed by-laws, with limited and relatively expensive memberships, with a policy of granting membership only to those approved by a majority vote of the elected board of directors or the general membership, with interviews and screening procedures, and with a policy of receiving only members and their guests must have *some* "plan or purpose" other than race. Second, social and financial acceptability, shared interests in swimming, and such subjective factors as compatibility and decent behavior are sought in prospective members even if the by-laws do not so detail. Above all, the general public is not invited to swim with the members. Third, it is demonstrably untrue that geography is the sole determinant for membership inasmuch as the by-laws explicitly permit 30% of the membership to be drawn from outside the prescribed area (A. 43) and the membership rolls include families outside the area (A. 128). The "hollow ring" (Pet. Br. 22) of Wheaton-Haven's claimed status was not discerned by Chief Judge Haynsworth, writing for the court of appeals:

> That standards are not immediately and precisely ascertainable, however, does not mean that they do not exist. Some considerations of social and financial standing are implicit in the size of the fees and the dues. There are selective elements other than race alone. Rejection of white applicants is, though rare, not unheard of (Pet. App. B-21). We cannot say that its inability to produce a detailed set of clear, precise

and unmistakable standards for membership marks it as a covered establishment (Pet. App. B-22).

The attempt by petitioners (Pet. Br. 29) to equate the Wheaton-Haven initiation fee of $375 and the annual dues of $50-$60 with a lump sum public admission charge ignores the fact that the public has never been admitted to Wheaton-Haven under any circumstances (Pet. App. C-2, C-3).[8]

Their parallel attempt (Pet. Br. 29) to identify the numerical limitation on membership as only a variant of the seating capacity of a public accommodation is disingenuous. If the limitation was made only in the interest of health and safety, it would seem that the limitation should apply to daily pool use and not to membership. That limitation was more likely intended to distribute among Wheaton-Haven's middle class members the financial burden of maintaining the pool facilities. Wheaton-Haven remains small enough to insure associational privacy but large enough to prevent membership costs from becoming exorbitant.

However, petitioners' argument is more instructive for what it conceals. Petitioners ignore the fact that Wheaton-Haven is member-owned and member-controlled and hence exempt from both state and federal income taxes as a nonprofit, member-owned and member-controlled recreational facility (A. 10, 97, 99; Pet. App. B-19, C-4). They ignore the fact that well-attended annual membership meetings are held (Pet. App. B-18). They ignore the fact that mem-

[8] Montgomery County, Maryland, an amicus curiae here, also feels that this investment is a veritable drop in the bucket to the average family in Montgomery County and hence is functionally equivalent to a sham "membership fee" (Brief for Montgomery County at 22). Any resident of Montgomery County would be puzzled by the economic logic that equates $325 and $50 with the 25 cent "membership fee" paid by transients in *Daniel v. Paul*, 395 U.S. 298 (1969).

bership interviews are conducted (Pet. App. B-21). They ignore the fact that Wheaton-Haven does not publicly advertise its facilities or hold itself out to the general public (Pet. App. B-18, 19). They ignore the fact that the board of directors is elected popularly by the members, that board action is subject to membership veto, and that directors with unpopular views have been voted out of office. They ignore the fact that the general membership ratified the board's member and guest policy (A. 117).

Petitioners conclude that Wheaton-Haven is "functionally similar" (Pet. Br. 21) to the recreation facility in *Daniel v. Paul*, 395 U.S. 298 (1969) and hence covered by the 1964 Civil Rights Act. However, even a casual perusal of that case belies this "functional similarity". In *Daniel v. Paul*, this Court held that Lake Nixon, a 232-acre amusement and recreation park, was a public accommodation covered by the 1964 Act. Lake Nixon's assertion that it was "not in fact open to the public" was dismissed in light of a record disclosing that membership cost 25 cents per season and the "club" catered to more than 100,000 transient "members" each year. As Mr. Justice Brennan wrote for this Court, Lake Nixon "was simply a business operated for profit with none of the attributes of self-government and member-ownership traditionally associated with private clubs." Id. 302.

Wheaton-Haven is not Lake Nixon. Nor is Wheaton-Haven the restaurant on the interstate highway that has suddenly taken on the trappings of a "private club". *United States v. Richberg*, 398 F.2d 523 (5th Cir. 1968). Wheaton-Haven is not the "private" 23-acre recreation center with a general admission fee for whites at the gate. *Scott v. Young*, 421 F.2d 143 (4th Cir. 1970). It is not the "private" amusement park that publicly advertises "everybody come" and then denies black children the right to

ice skate. *Miller v. Amusement Enterprises, Inc.*, 394 F.2d 342 (5th Cir. 1968). It is not the nationally-affiliated organization that grudgingly admits blacks into its lodging facilities but refuses them admission to adjacent and common athletic facilities. *Nesmith v. YMCA of Raleigh, N.C.*, 397 F.2d 96 (4th Cir. 1968). It is not a country club or swim club operated for corporate profit without any member involvement. *Bell v. Kenwood Golf and Country Club, Inc.*, 312 F. Supp. 753 (D. Md. 1970); *Clover Hill Swimming Club v. Goldsboro*, 47 N.J. 25, 219 A.2d 161 (1966).

It is true that Wheaton-Haven draws its membership primarily from the surrounding community. At the same time, however, it is not an establishment which invites the public while masquerading as a private club. Member-owned, member-controlled and member-governed, it does not seek the public, admit the public, or want the public. Wheaton-Haven meets the only express test laid down by Congress in the 1964 Civil Rights Act — an "establishment not in fact open to the public" (42 U.S.C. §2000 a(e)). While its membership is drawn primarily from families within a ¾-mile radius of the pool, neighborhood proximity does not and never has mandated acceptance upon demand.[4] Wheaton-Haven's by-laws contain no stated policy that personal compatibility or acceptability are necessary for membership just as they contain no racial criteria.[5] Each

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[4] Petitioners' reliance (Pet. Br. 21) on the neighborhood relatedness of Wheaton-Haven in order to bring the club within the ambit of 42 U.S.C. §1982 is misplaced. As a practical matter people seeking admission to a private club will inevitably choose one which is conveniently located.

[5] The district court addressed this point below: "Admittedly the standard by which they determine eligibility for membership is not set forth in the corporation's charter or by-laws or in any Board of Directors resolution; but, *since that is the common practice of all clubs*, the absence of such an articulated standard does not imply that the only standard is racial" (Pet. App. C-8) (Italics supplied). Club

applicant is screened, interviewed and elected by actual vote of the elected board of directors or of the general membership (A. 43). A veto power remains in the members (A. 43). In short, Wheaton-Haven is maintained and governed by its members and their elected board — a pool where members can swim and socialize with other members on the humid days and nights of summer.

If petitioners were to prevail in their contention few voluntary self-governing private associations could retain any discretion in the selection of prospective members. Their theory of "exclusiveness" might not disturb the Society of Mayflower Descendants but it would, carried to its inevitable conclusion, transform member facilities maintained by private organizations "not in fact open to the public" into public accommodations.[6] It cannot be said that Wheaton-Haven lacks selectivity because it exercises its membership veto power infrequently (Pet. Br. 22). If frequency were a necessary factor, the 1866 Civil Rights Act could not have been revived. In *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968), the Court recognized that the century-old provisions of 42 U.S.C. §1982 were effective and that "the fact that the statute lay partially dormant for many years cannot be held to diminish its force today." *Id.* at 437. Likewise, Wheaton-Haven's discretion to reject applicants is in no way diminished by infrequent exercise.

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admissions policies invariably mirror the likes and dislikes of the membership and thus defy precise formulation — a truth encapsulated in the ageless nursery rhyme: "I do not like the Dr. Fell / the reason why I cannot tell / but this I know, and know full well / I do not like thee Dr. Fell".

[6] In a similar context last term, this Court refused to extend a public function analysis so far as to emasculate the distinction between private and public property. *Lloyd Corp. v. Tanner*, 92 S. Ct. 2219 (1972). *Cf. Moose Lodge No. 107 v. Irvis*, 92 S. Ct. 1965 (1972), where it was held that a state liquor license did not alter the character of a private club.

Nor can Wheaton-Haven's discretionary prerogatives be discounted because they have been exercised *formally* on few occasions (Pet. Br. 22). As Chief Judge Haynsworth said for the court below, such groups customarily exercise their power to reject by informal screening:

> It is typical of the manner in which private clubs often screen prospective members. Very often the actual application for membership is strictly a formality, for the club's decision will have been already made.
>
> Dr. Press, of course, was rejected in exactly this manner. Because he was never allowed to make a formal application for membership, he would not appear on Wheaton-Haven's books as having been rejected, despite the fact that we know he was (Pet. App. B-21, n. 23).

We do not understand *Sullivan v. Little Hunting Park*, 396 U.S. 229 (1969) to have articulated an exclusive set of standards for determining the public or non-public character of associations (Pet. Br. 20-21). Little Hunting Park's claims of privacy were rejected in *Sullivan* without extended comment.[7] The formulation expressed in *Moose Lodge No. 107 v. Irvis*, 92 S. Ct. 1965, 1970 (1972), is more to the point:

> Moose Lodge is a private club in the ordinary meaning of that term. It is a local chapter of a national fraternal organization having well defined requirements for membership. It conducts all of its activities in a building that is owned by it. It is not publicly funded. Only members and guests are permitted in any lodge of the order; one may become a guest only

[7] "The Virginia trial court rested on its conclusion that Little Hunting Park was a private social club. But we find nothing of the kind on this record. There was no plan or purpose of exclusiveness. It is open to every white person within the geographic area, there being no selective element other than race." *Sullivan v. Little Hunting Park*, 396 U.S. 229, 236 (1969).

by invitation of a member or upon invitation of the house committee.

In *Moose Lodge* the only elements of selectivity other than race consisted of being an adult male with deistic beliefs and a good moral character.[8] It is apparent that racial selectivity was the paramount if not the only real consideration for membership in Moose Lodge No. 107. Wheaton-Haven, with its more limited membership, and its implicit financial and social qualifications for membership, is as surely a private club — a member-controlled, self-governing, voluntary association "not in fact open to the public".

To label Wheaton-Haven a public accommodation and within the coverage of the 1964 Act would emasculate the "not in fact open to the public" language that Congress so deliberately inserted in the statute. The distinction between a public accommodation and an establishment not in fact open to the public was a matter of significant concern to Congress. It was a distinction made after "sifting facts and weighing circumstances". *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 722 (1961). We submit that Chief Judge Haynsworth was eminently correct when he concluded for the court of appeals:

> [I]ts form of organization, its manner of operation, and its member activities are all characteristic of a bona fide private club rather than a place of public accommodation, and . . . it clearly meets the only

[8] "The regulation means . . . that it [Lodge 107] must adhere to the racially discriminatory provision of the Constitution of its Supreme Lodge that 'membership of the lodge shall be composed of male persons of the Caucasian or White race above the age of twenty-one years, and not married to someone other than the Caucasian or White race, who are of good moral character, physically and mentally normal, who shall profess a belief in a Supreme Being'." *Moose Lodge No. 107 v. Irvis*, 92 S. Ct. 1965, 1975 (1972) (cited by Douglas, J., dissenting).

express test set out by Congress — that it be 'not in fact open to the public' . . . (Pet. App. B-22).

B. Wheaton-Haven As An Exempt Establishment Under The 1964 Civil Rights Act Is Not Subject To Liability Under 42 U.S.C. §§1981 and 1982.

The court of appeals found that the private club exemption in the 1964 Act was a statutory recognition of constitutionally grounded rights. "The majority [of Congress], however, justified the exemption for private clubs as an appropriate recognition of rights of privacy and associational preferences in cases 'where freedom of association might logically come into play * * *.'" (Pet. App. B-7, n. 5).[9]

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[9] The court of appeals relied primarily upon statutory construction. Chief Judge Haynsworth, recognizing that repeal by implication is not favored, said for the court:

> We have here not the mere failure in a later statute to include a prohibition contained in an earlier one covering the same subject matter; rather to the earlier general statute . . . is added a later one which expressly protects it, if the defendant is in fact a private club (Pet. App. B-6, n. 5).

The holding below is especially compelling in view of the fact that the 1964 Congress, believing it was writing on a clean slate, positively exempted establishments not in fact open to the public. The Congressional understanding in 1964 as to the reach of the 1866 Act is certainly more than "very remotely relevant" (Brief for United States as Amicus Curiae at 26, n. 15). It is obviously instructive that the Congress, legislating *in vacuo*, created a positive exemption by explicit recognition of the associational rights of private clubs. *See generally Hearings on S. 1732 before Senate Committee on Commerce*, 88th Con., 1st Sess. The private club exception was in Title II from introduction of the bill until passage and only underwent minor rephrasing. *Senate Report No. 872*, 1964 *U.S. Code Cong. & Ad. News* 2355, 2359. The clear intent of the 1964 Congress was to explicitly reserve an area of activity which the statute could not reach. *See supra* n. 1.

The decision below is also consistent with *Sullivan v. Little Hunting Park*, 396 U.S. 229 (1969) wherein this Court did not hold §1982 to be applicable until first deciding that Little Hunting Park was not a private club. See, *id.* at 236.

Petitioners now contend that §§1981 and 1982 apply to private organizations not in fact open to the public even if such organizations are specifically exempted by the 1964 Act. They characterize the Fourth Circuit's holding as a "demonstrated lack of regard for precedent set by this Court" (Pet. Br. 15, n. 8). In the district court, however, petitioners *conceded* that, if Wheaton-Haven was a private club, a §1981 or §1982 claim would not lie.[10] If Wheaton-Haven is an excepted organization free to ignore claims of petitioners under the 1964 Act, it would be anomalous to compel it to defer to identical claims under the less explicit 1866 Act. As the district court said below:

> The determination that Wheaton-Haven's discrimination is permitted under the 1964 Act which explicitly deals with such a factual situation should preclude a determination that the same conduct violates the less explicitly applicable principles of Section 1981 and Section 1982. (Pet. App. C-10).

The fact that §§1981 and 1982 contain no specific exception (comparable to that which appears in the more sophisticated 1964 Act) does not mean the 1866 Act and the later statute are at war with one another. In *Hunter v. Erickson*, 393 U.S. 385, 388 (1969), this Court noted that the century-old Act considered in *Jones v. Alfred Mayer Co.*, 392 U.S. 409 (1968), should be read together with later statutes on the same subject, so as not to pre-empt that which the later statutes explicitly preserve. This reinforces the familiar principle that legislation *in pari materia* should

[10] "Mr. Brown [attorney for petitioners]: But, of course, the question of whether its a private club, we will also concede for this — for any purposes, would — is also relevant both to Section 2000 as well as Sections 1981 and 1982, we don't think it is a private club, but if it is a private club, then neither 1981, 1982 or 2000 would apply, I think the same principles would be applicable." Transcript of Proceedings in United States District Court for District of Maryland, June 24, 1970, at 18, on file in this Court.

be read together.[11] "It is clear that 'all acts *in pari materia* are to be taken together, as if they were one law.'" *United States v. Stewart*, 311 U.S. 60, 64 (1940); *United States v. Freeman*, 3 How. 556, 564 (1845). See also, *Talbot v. Seeman*, 1 Cranch 1, 34-35 (1801). As this Court said in a parallel context:

> To be sure, what Congress did in 1959 does not establish what it meant in 1947. However, as another major step in an evolving pattern of regulation of union conduct, the 1959 Act is a relevant consideration. *Courts may properly take into account the later Act when asked to extend the reach of the earlier Act's vague language to the limits which, read literally, the words might permit.*

NLRB v. Allis-Chalmers Manufacturing Co., 388 U.S. 175, 194 (1967); *NLRB v. Drivers, Etc., Local Union No. 639*, 362 U.S. 274, 291-292 (1960). (Italics supplied.)

However, it may not be necessary for this Court to inquire into the so-called preemptive effect of the 1964 Act upon §§1981 and 1982 since it is clear that petitioners have not shown a violation of any contractual or property rights secured by §§1981 or 1982. Petitioners seek to establish violations of §§1981 or 1982 by bringing Wheaton-Haven under the umbrella of *Sullivan v. Little Hunting Park, supra*, (Pet. Br. 10-27). In *Sullivan*, the petitioner leased his home to Freeman, a Negro. Included in the lease was an assignment of the membership share in Little Hunting Park. Little Hunting Park refused to accept the assignment.

The attempt to equate the non-transferable membership in Wheaton-Haven with the freely transferable member-

[11] Judge Learned Hand once alluded to a parallel principle of statutory construction in *Lehigh Valley Coal Co. v. Yensavage*, 218 F. 547, 553 (2nd Cir. 1914) where he said that statutes "should be construed, not as theorems of Euclid, but with some imagination of the purposes which lie behind them."

ship share of *Sullivan* is fanciful. A Wheaton-Haven membership is not transferable. If a Wheaton-Haven member sells his home to a purchaser, Wheaton-Haven may repurchase the membership, depending on the existence of a waiting list (A. 47). The purchaser of the home has a first option "to purchase the membership of the seller *solely from the Association* . . .; provided, however, that the seller forwards a written resignation to the association, and the purchaser makes a formal written application for membership . . ." (A. 47) (Italics supplied.) The application of an option holder must be accepted by the board of directors or the membership, in the same manner as any other applicant for membership. The first option merely allows the holder to have his application considered before others on the waiting list. As Chief Judge Haynsworth said for the court of appeals: "It is far too tenuous a thread to support a conclusion that there is a transfer of membership incident to the purchase of property" (Pet. App. B-13). Moreover, the argument does not avail petitioners in the slightest since Dr. Press's vendor was never a member of Wheaton-Haven and had no option of any kind to convey.[12]

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[12] Assuming *arguendo* that a first option in Wheaton-Haven could be an incident of the real property, one is at a loss to discern how Dr. Press has any rights under §1982. Dr. Press, it is agreed, bought his residence from a seller who was not a member of Wheaton-Haven (Pet. App. B-13, n. 14; C-11). Thus factually the instant case is inapposite to *Sullivan v. Little Hunting Park*, since the club membership share is not annexed to a real estate transaction. Wheaton-Haven has not interfered on the basis of race with the purchase and sale of any real or personal property between Dr. Press and anyone. The petitioners' retroactive argument, in effect, says that the membership share could be, in the future, an incident of a real estate transaction and that, therefore, it is an incident of the real estate now and was so at the time of Dr. Press's purchase (Pet. Br. 9, 10, 17, 18). Such an argument is without merit.

As this Court said last term: "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." *Board of Regents of State Colleges v. Roth*, 92 S. Ct. 2701, 2709 (1972). *See* discussion *supra* n. 14, p. 18.

Since Dr. Press has not made out a §1982 claim, his complaint must be bottomed on §1981. However, §1981 surely does not mandate a contract on demand, provided the demand is made by a black citizen (Pet. Br. 17).[13] Petitioners' argument implies that Wheaton-Haven makes a continuing offer of membership to whites while denying that offer to blacks. But that simply is not borne out by the record. Dr. Press, as have all other prospective applicants in the past, attempted to solicit an offer from Wheaton-Haven. No offer was forthcoming (Pet. App. B-21, n.23). The petitioners find an offer where none was ever made. Surely §1981 was not enacted to drastically alter the law of contract. It was enacted to allow willing parties to enter a contract free of racial impediments. The asserted "contract" does not fit that description.[14]

C. Application Of The Civil Rights Acts Of 1866 Or 1964 To Wheaton-Haven Would Raise Serious Constitutional Questions.

The "not open to the public" exception of the 1964 Civil Rights Act is a statutory recognition of the historic right of

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[13] Historically, courts have declined to imply a contractual right of admission into private, voluntary organizations. "Membership is a privilege, which may be accorded or withheld, and not a right, which can be gained independently and then enforced." *McKane v. Adams*, 123 N.Y. 609, 612, 25 N.E. 1057 (1890); *White v. Brownell*, 2 Daly 329, 358 (N.Y. 1868).

[14] If Dr. Press has no §1981 or §1982 claim still less can be said of petitioner Tillman's rights and those of his guest, petitioner Rosner, whose claims stand or fall with Tillman's. Unlike the petitioners in *Sullivan v. Little Hunting Park*, Tillman has been treated no differently than any other member of Wheaton-Haven. *See Trafficante v. Metropolitan Life Ins. Co.*, 446 F.2d 1158 (9th Cir. 1971), *cert. granted*, 405 U.S. 915 (No. 71-708) (1972). As a white member, Tillman's *own* right under §1981 to receive the same contractual benefits "enjoyed by white citizens" would seem unimpaired. Nor may he vindicate alleged racial discrimination against his guest since "a litigant has standing to seek redress for injuries done to him but may not seek redress for injuries done to others." *Laird v. Tatum*, 92 S. Ct. 2318, 2326 n. 7 (1972). Petitioner Rosner's contractual claims necessarily fall with her host's.

individuals to choose their associates. As noted earlier, Wheaton-Haven comes within the purview of that exception as being, in fact, not open to the public. To sustain the position advocated by petitioners would create serious problems, since "lurking in the background are grave constitutional issues should §1982[15] be extended too far into some types of private discrimination." *Sullivan v. Little Hunting Park, supra* at 248 (Harlan, J., dissenting).

This Court has consistently recognized the constitutional right of citizens to choose their associates, free from government-directed interference. *Baird v. State Bar of Arizona*, 401 U.S. 1 (1971); *NAACP v. Button*, 371 U.S. 415 (1963). "Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association . . ." *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462 (1958). Associational rights have been protected "that are not political in the customary sense but pertain to the *social*, legal and economic benefits of the members." *Griswold v. Connecticut*, 381 U.S. 479, 483 (1965) (italics supplied). "A private golf club, however, restricted to either Negro or white membership is one expression of freedom of association." *Evans v. Newton*, 382 U.S. 296, 299 (1966). As Mr. Justice Douglas said last term:

> The associational rights which our system honors permits all white, all black, all brown, and all yellow clubs to be formed. They also permit all Catholic, all Jewish, or all agnostic clubs to be established. Government may not tell a man or woman who his or her associates must be. The individual can be as selective as he desires.

Moose Lodge No. 107 v. Irvis, 92 S. Ct. 1965, 1974-75 (1972) (Douglas J., dissenting).

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[15] The same constitutional problems obtain in the application of §§1981, 2000a and similar statutes.

This Court's concern for protection of associational rights parallels the protection historically afforded by the common law. The English equity courts centuries ago refused to issue mandamus to compel admission of unwanted parties.[16] Blackstone in England and Alexis de Tocqueville in America highlighted this concern for associational privacy as a hallmark of the British and American political systems.[17]

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[16] The common law considered membership as within the complete control of the association. One refused membership was "entirely without legal remedy, no matter how arbitrary or unjust may be his exclusion." 6 AM. JR. 2d, *Associations* §18, 443-444.

The roots of this principle run deep. In *The King v. the Archbishop of Canterbury and the Bishop of London*, 15 East 117, 104 Eng. Rep. 789 (1812), for example, the King's Bench discharged a rule for mandamus to the Bishop of London. "So it is with the bishop, in respect of the question of fitness: this Court will not interfere with his judgment in that respect. . . ." *Id.* at 126, 792. "There is no instance of such an application for a mandamus to compel a bishop to approve:" *Id.* at 139, 797. The rule was not a novel one in 1812. *Bishop of Exeter v. Hele*, Show. Parl. Cas. 114, 1 Eng. Rep. 61 (H.L. 1693); *Churchwardens of St. Bartholomew's*, 3 Salk. 87, 91 Eng. Rep. 709 (K. B. 1701).

[17] One's right to make this own social choices free from intrusion was recognized by the common law before the Constitution was written. Blackstone's COMMENTARIES recognized a sphere where no government should go:

> For the end and intent of such laws being only to regulate the behavior of mankind, as they are members of society, and stand in various relations to one another, they have consequently no business or concern with any but social or relative duties. Let a man therefore be ever so abandoned in the principles, or vicious in his practice, provided he keeps his wickedness to himself, and does not offend against the rules of public decency, he is out of the reach of human laws. 1 W. BLACKSTONE, COMMENTARIES* 120 (1765).

Alexis de Tocqueville posited a similar understanding of the rights of governments and the rights of men:

> The most natural privilege of man next to the right of acting for himself, is that of combining his exertions with those of his fellow creatures and of acting in common with them. The right of association therefore appears to be almost inalienable in its nature as the right of personal liberty. No legislator can attack it without impairing the foundation of society. 1 DEMOCRACY IN AMERICA 196 (Bradley ed. 1954).

He continued and said: "[I]n no country in the world has the principle of association been more successfully used or more unsparingly

American courts have followed their English counterparts in this area:

> No case can * * * be found where the power of any court has been exercised * * * to require the admission of any person to original membership in any such voluntary association. * * * No person has any abstract right to be admitted to such membership * * *.[18]

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applied to a multitude of different objects than in America." *Id.* at 197. "[N]othing could be more natural to an American than to join an association in pursuit of interests shared by others. . . ." W. WARNER, THE EMERGENT AMERICAN SOCIETY 276 (1967). Indeed, the American character was neatly summarized in the title of a well known article. *Schlesinger, Biography of a Nation of Joiners,* 50 AM. HIST. REV. 1 (1944).

The hallmark of the English and American political systems has been the common regard for the right of the individual to be free from state interference in his daily social and personal affairs.

[18] *Mayer v. Journeymen Stonecutters' Ass'n.,* 47 N.J. Eq. 519, 524, 20 A. 492, 494 (1890). The English doctrine was adopted by American courts, as summarized in *Trautwein v. Harbout,* 40 N.J. Super. 247, 260, 123 A.2d 30, 37 (1956):

> The authorities cited by plaintiffs are almost entirely expulsion cases. As we shall see, there are *no* adjudicated cases which can be regarded as square holdings as to the existence of a right of action for damages for wrongful exclusion *from a purely social or fraternal organization,* and our consideration of that subject must perforce be based upon principle and analogies of related torts. If . . . the instant case . . . [was] truly one of expulsion from membership, the cases cited by plaintiffs would be pertinent. (Italics supplied.)

See also *Ross v. Ebert,* 275 Wis. 523, 82 N.W.2d 315 (1957); *Arnstein v. ASCAP,* 29 F. Supp. 388 (S.D. N.Y. 1939).

The principle that courts will not interfere with the admission procedures of voluntary social and fraternal organizations continues in force. Last term this Court said: "Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law . . ." *Board of Regents of State Colleges v. Roth,* 92 S. Ct. 2701, 2709 (1972). In Maryland, where Wheaton-Haven is located, "the expressed rule is that usually a private voluntary organization may accept or refuse members as it chooses, subject only to its own constitution, charter and by-laws." *Grempler v. Multiple List. Bureau,* 258 Md. 419, 426, 266 A.2d 1, 4-5 (1970).

Concern for associational privacy has always tempered this Court's approach to civil rights. In the *Civil Rights Cases*, 109 U.S. 3, 24 (1883), this Court stated the constitutional principle in certain terms. "It would be running the slavery argument into the ground to make it apply to every act of discrimination which a person may see fit to make as to the guests he will entertain, or as to the people he will take into his coach or cab or car . . . ." The first Justice Harlan, in dissent, agreed with the majority on the principle itself:

> I agree that government has nothing to do with social, as distinguished from technically legal, rights of individuals. No government ever has brought, or ever can bring, its people into social intercourse against their wishes. Whether one person will permit and maintain social relations with another is a matter with which government has no concern. *Id*, at 59.

Mr. Justice Goldberg, concurring in *Bell v. Maryland*, 378 U.S. 226, 313 (1964), reiterated the constitutional understanding.

> Prejudice and bigotry in any form are regrettable, but it is the constitutional right of every person to close his home or club to any person or to choose his social intimates and business partners solely on the basis of personal prejudices including race. These and other rights pertaining to privacy and private associations are themselves constitutionally protected liberties.

The right to choose one's associates can be exercised arbitrarily, capriciously and for the worst motives. It is, however, a right guaranteed citizens of all races, religions, and nationalities by the Constitution and unimpaired by civil rights acts. It is a right that is enjoyed by all citizens, not reserved for the exclusive benefit of the socially elite.

> There are two complementary principles to be reconciled in this case. One is the right of the individual

to pick his own associates so as to express his preferences and dislikes, and to fashion his private life by joining such clubs as he chooses. The other is the constitutional ban . . . against state-sponsored racial inequality . . . . A private golf club, however, restricted to either Negro or white membership is one expression of freedom of association. *Evans v. Newton*, 382 U.S. 296, 298-299 (1966).

II.

JUDGMENT WAS PROPERLY ENTERED IN FAVOR OF A DIRECTOR OF WHEATON-HAVEN WHO WAS OPPOSED TO THE POLICY OF RACIAL DISCRIMINATION ATTRIBUTED TO THE CORPORATION.

In the event that this Court were to conclude that Wheaton-Haven falls within the coverage of the Civil Rights Acts of 1866 or 1964, the judgment should be affirmed nevertheless as to McIntyre on the basis that no acts of racial discrimination have been attributed to him personally. That the courts below found it unnecessary to reach this issue is immaterial. This Court may consider any position in support of the judgment in his favor which find support in the record. *Jaffke v. Dunham*, 352 U.S. 280, 281 (1957); *Walling v. General Industries Co.*, 330 U.S. 545, 547 (1947); *Langnes v. Green*, 282 U.S. 531, 533-539 (1931).

The present complaint articulates no basis for relief against McIntyre or any other individual defendant. Although petitioners complain of the collective refusal by the corporation and its officers and/or directors to permit them use of the pool, the short answer is that one never incurs personal liability for corporate acts or policies "unless he specifically directed the particular act to be done, or participated or cooperated therein" 3 FLETCHER CYCLOPEDIA CORPORATIONS, §1137 (1965 ed.). "Specific direction

or sanction of, or active participation or cooperation in, a positively wrongful act of commission or omission which operates to the injury or prejudice of the complaining party is necessary to generate individual liability in damages of an officer or agent of a corporation for the tort of the corporation" *Lobato v. Pay Less Drug Stores*, 261 F.2d 406, 409 (10th Cir. 1958). Merely identifying one as an "officer and/or director" of the offending corporation is not enough. *McCoy v. Stroud & Co.*, 373 F.2d 862, 865 (3rd Cir. 1967); *Lahr v. Adell Chemical Co., Inc.*, 300 F.2d 256, 260 (1st Cir. 1962); *Phelps Dodge Refining Corp. v. FTC*, 139 F.2d 393, 397 (2d Cir. 1943). And conclusory allegations in the complaint to this effect are equally insufficient to withstand a properly supported motion for summary judgment. *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 288-290 (1968).

What is true with respect to actions at law for damages is equally applicable in suits for injunctive relief:

> * * * [T]he officers, agents and stockholders of a corporation are not necessary parties defendant in either an action at law or a suit in equity against the corporation unless, generally, they have a distinct individual and indivisible interest or a distinct several liability as participants in the wrongdoing or breach of contract complained of; and it is ordinarily improper to join them as such parties defendant merely because of their relation to the corporation. And this rule undoubtedly obtains in the case of a suit for an injunction as well as in the case of any other suit in equity. 10 FLETCHER CYCLOPEDIA CORPORATIONS §4873 (1970 rev.).

And see *SEC v. Union Corp. of America*, 205 F. Supp. 518, 521-522 (E.D. Mo.), *aff'd* 309 F.2d 93 (8th Cir. 1962) (injunction against corporation not extended to officers and directors not shown to have acted in bad faith).

Although the question has never been squarely decided by this Court, there is unanimity of decision in the lower federal courts that corporate conduct which is actionable under civil rights legislation does not, of itself, impose personal liability upon individuals acting solely in a representative capacity. Unless the complaint specifically alleges acts of personal wrongdoing, a claim is not stated against members of a board charged with acting improperly as a corporate body. *Derby v. University of Wisconsin*, 325 F. Supp. 163, 164 (E.D. Wis. 1971); *Lessard v. Van Dale*, 318 F. Supp. 74, 75-76 (E.D. Wis. 1970); *Abel v. Gousha*, 313 F. Supp. 1030, 1031 (E.D. Wis. 1970); *Schwartz v. Galveston Independent School District*, 309 F. Supp. 1034, 1037-1038 (S.D. Texas 1970); *Wesley v. City of Savannah, Georgia*, 294 F. Supp. 698, 703 (S.D. Ga. 1969) (as to three defendants).

Petitioners do not dispute these principles of personal liability. Instead they seek to implicate McIntyre in the exclusionary policies which they attribute to Wheaton-Haven (Pet. Br. 31, n.18). However, it was McIntyre who "championed the cause of the admission of Dr. Press" (Pet. App. B-30). As a director of Wheaton-Haven, he stood opposed to policies of racial exclusion (A. 111, 124-126).

Petitioners assert that McIntyre informed Dr. Press he was probably unacceptable to the membership because of his race (Pet. Br. 31, n.18), but fail to point out that McIntyre, voluntarily "sounded out" other members of the board of directors because Dr. Press asked him to do so (A. 105, 124). Petitioners also complain that McIntyre never made a motion at a board meeting to admit Dr. Press to membership (Pet. Br. 31, n.18). The petitioners do not attempt to clarify why McIntyre was, in the first place, under any duty to do so. But even if such a duty existed,

any motion would have been a futile exercise since it would have been voted down (A. 104, 105, 124).[19]

It should be noted McIntyre was defeated for reelection to Wheaton-Haven board of directors when his term expired late in 1970. While retaining ordinary membership, he no longer occupies any position in the organizational hierarchy and cannot participate in the board's decisions. Under analogous circumstances, an action to compel an official to perform a public duty is held to abate against the incumbent upon his retirement, although it may survive as to his successor. *Two Guys From Harrison-Allentown, Inc. v. McGinley*, 366 U.S. 582, 588-589 (1961); *Pullman Co. v. Knott*, 243 U.S. 447 (1917); *Warner Valley Stock Co. v. Smith*, 165 U.S. 28 (1897). Identical considerations apply here.

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[19] With respect to Wheaton-Haven's policy as to guests, petitioners assert: ". . . [A]t one board meeting in the summer of 1968, when Wheaton-Haven's guest policy was under discussion, McIntyre admittedly made a motion 'to bar all Negro guests' " (Pet. Br. 31, n. 18).

The so-called motion "to bar all Negro guests" must be considered in propert context. During the meeting in question McIntyre urged the board to formulate a specific guest policy so as to relieve the teenage gate attendants of the decisional burden. He proposed initially a resolution to admit any bona fide guest, *irrespective of race*. Only after that resolution failed did he submit his contrary motion, which failed for want of a second. Disgusted by the board's indecisiveness, McIntyre left the meeting and "went for a swim" (A. 116). The guest policy was adopted by the board and ratified later by the general membership (A. 117). McIntyre voted against that policy (A. 125-126).

CONCLUSION

For the foregoing reasons, the judgment should be affirmed.

Respectfully submitted,

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